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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 112

AMOS REECE, PETITIONER,

vs.

STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED APRIL 13, 1955

CERTIORARI GRANTED MAY 31, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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VS.

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1

In the Superior Court of Cobb County

INDICTMENT No. (1961)

RAPE

THE STATE

vs.

AMOS REECE

MOTION TO QUASH INDICTMENT—Filed October 30, 1953

GEORGIA, COBB COUNTY:

To the Superior Court of said State and County:

Now comes AMOS REECE, the defendant in the above entitled indictment, and, through his attorneys, moves this Court to quash the indictment herein upon the following grounds, to-wit:

1

The movant, AMOS REECE, is a male person 28 years of age and is a member of the Negro race.

2

The movant was indicted by the Grand Jury of Cobb County, Georgia, in the above entitled case, the same being a felony.

3

That the trial of the movant is set for the 30th day in October 1953, in Cobb County, Georgia, in the Superior Court of said county and state, and that if upon said trial the movant is convicted on said indictment, under the laws of the State of Georgia, he can be hanged, electrocuted, or put to death in any of the ways authorized by the law to do so, the said indictment charging the movant with the commission of a capital felony.

4

That according to the United States census of 1950 there were approximately 55,606 members of the white race and 6,224 members of the negro race who lived in said county, according to the 1951 addition of the Statistical Abstract of the State of Georgia.

That there were 16,201 male white citizens 21 years of age

2 and older, and 1,710 male negro citizens 21 years of age and older in the said County, according to U. S. Census, 1950.

5

That the Grand Jury which indicted the movant was composed of persons whose names appeared in the Grand Jury Box of said County, and that the names appearing in said Grand Jury Box were placed therein by the Jury Commissioners of said County in accordance with the Georgia Statutes.

6

That the number of names appearing on the Grand Jury list of said County is 534, and that all of the said names appearing on said list are the names of persons who are members of the white race except 6 names of members of the negro race although there are those other persons of the negro race who would be otherwise qualified to serve in the capacity of Grand Jurors; that the negro men whose names do appear thereon are well known by all those who draw the panel of Grand Jurors.

7

That for more than 18 years no member of the negro race has served on the Grand Jury of said County.

8

That petitioner has reason to believe that the name of no member of the negro race has been in the Grand Jury Box of said County, unless it was notoriously known to be such.

9

That there are 1108 citizens of the negro race of said County whose names are on the books of the Tax Receiver of said County, but whose names appear in said books on special pages and in separate sections or separate books apart from the tax payers of the white race, and whose names are designated "colored" by the tax commissioner.

3 10

That the names of all white citizens of said County who make tax returns are maintained in books containing white paper, and in separate sections of the tax books.

11

That there are numerous citizens of said County who are members of the negro race who are competent and qualified jurors as to

age, experience, intelligence, and uprightness, and who are legally qualified to act as Grand Jurors, but the names of these persons have been purposely and expressly excluded from said Jury Boxes solely on account of their being members of the negro race.

12

That the Grand Jury which returned a true bill of indictment against this movant was not made up of a jury of his peers selected from a true cross-section of said County's population.

13

That the Grand Jury which returned the true bill of indictment against movant consisted solely of members of the white race and that members of the negro race were purposely, systematically, unlawfully, and unconstitutionally excluded from service on said Grand Jury.

14

That the systematic and purposeful exclusion of negroes from the Grand Jury which indicted movant is a violation of the rights of movant under Article 1, Section 1, paragraph 3 of the Constitution of the State of Georgia, which is the "due process clause", is a violation of his rights under Article 1, Section 1, paragraph 25 of the Constitution of the State of Georgia, which is the "equal protection clause", and a violation of his rights under the 14th Amendment of the Constitution of the United States of America and of 8 U.S.C.A. paragraph 44.

15

That movant is informed and believes, and charges, that there has not been a negro to serve on the Grand Jury of said County for at least 18 years; that the officers of said County have systematically, purposefully, and unlawfully excluded members of the negro race from Grand Jury service during this period of time.

Wherefore, movant prays that the indictment herein returned against him be quashed, rendered null and void, and set aside and that he be granted such other and further relief as to this Court seems meet and proper.

GORDON M. COMBS
and
FRANK D. HOLCOMB,
Attorneys for Movant.

Duly sworn to by Amos Reece. Jurat omitted in printing.

5 In the Superior Court of Cobb County

ORDER OVERRULING MOTION—October 30, 1953

The within motion coming on before me to be heard and after hearing evidence under oath, it is considered, ordered and adjudged that the same be and is hereby overruled.

This 30th day of October, 1953.

JAS. T. MANNING,
J. S. C., C. J. C.

(File endorsement omitted)

6 SUBMISSION OF MOTION TO QUASH

Mr. COMBS: Now, your honor, we have another motion to make in this case, and Mr. Holcomb will present the motion. (Mr. Holcomb then read to the court the defendant's written motion to quash the indictment; and later offered in evidence in support of his motion the following testimony):

7 In Superior Court of Cobb County

TRANSCRIPT OF EVIDENCE ETC.

ED AUSTIN being duly sworn, testified as follows:

DIRECT EXAMINATION:

By Mr. COMBS:

Q. What is your name?
A. Ed Austin.
Q. Are you a member of the colored race?
A. Yes, sir.
Q. Where do you live?
A. At Acworth.
Q. Have you ever served on a grand jury in Cobb County?
A. No, sir.
Q. Acworth is in Cobb County?
A. I know it.
Q. And how many years have you lived there?
A. About thirty years.
Q. In Cobb County?
A. Yes, sir.

CROSS EXAMINATION.

By Mr. HAMES:

Q. How old are you?
A. I will be eighty-one years old the 27th day of November.
Q. You have a little trouble in hearing, don't you?
A. Well, I can hear very good.
Q. Have you been sick a little bit lately?
A. Yes, sir; I served nearly two months at Kennestone Hospital, had two serious operations.
Q. If you had been subpoenaed for grand jury service would you have been able to come?
A. No, sir.
Q. Would you have claimed your age as an exemption?
A. Well, my age would have been, but I have high blood-
8 pressure and a weak heart.
Q. You got a summons this week to serve on the jury, didn't you?
A. A man came to my home.
Q. You were summoned to come to court earlier this week?
A. No, sir, not this week; I think it was last week. I got my first one.
Q. As a juror?
A. As a juror.
Q. Now on that, would that be a summons as a witness in a case?
A. No, sir, for Cobb County grand jurymen.
Q. You were subpoenaed last week?
A. Or the week before one.
Q. And you claimed your exemption at that time and didn't come down here?
A. I got Mr. Homer Harrison to fill it out; I wasn't able to come.

TY TERRY being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. You are clerk of this court?
A. I am deputy clerk.
Q. Have you got a list of the grand jury selected by the jury commissioners?
A. Yes, sir.
Q. For what time?
A. The jury boxes were revised in 1952, the latter part of October.
Q. Are there any colored jurors on that list?
A. Yes, sir.

Q. Are they designated as colored jurors?
9 A. They are on the index.
Q. As colored jurors?
A. In this book as an index.
Q. How many are on the list?
A. Six.
Q. Will you call their names?
A. Frank Addison, of the Marietta District; Ed Austin, of the Acworth District; Willie M. Broadnax of McLand District; H. K. Clements, of the McLand District; Sam Drew, of Marietta, and John J. Hill, of the Marietta District.

CROSS EXAMINATION.

By Mr. HAMES:

Q. What connection do you have with the Board of Jury Commissioners?
A. Well, in the 1952 drawing or selection of the jury I was acting clerk.
Q. And you are today in that same capacity?
A. As far as I know, yes.
Q. When the petit jury was made up by the jury commissioners state how many petit jurors names were placed in the box, to your best recollection?
A. That I can't state. I can state this, to the best of my knowledge and belief that 10,115 names appeared on the tax digest, and the jury commissioners voted to put approximately twenty-five per cent of that number into the petit jury box.

Mr. COMBS: That is immaterial, and we move to exclude it.
Mr. HAMES: I think it is very material; I think I have
10 got to show how the books were made up.
The COURT: I overrule the objection; go ahead.

Q. Then roughly 2,500 names appear in the jury box?
A. I don't recall the number.
Q. Well, from what you said they voted to do, they took approximately 2,500, or twenty-five per cent of those names approximately to put in the petit jury box?
A. Yes, sir.
Q. In the making up of the 2,500 was there any further action taken with reference to the white and colored?
A. No distinction was made.
Q. Now of the list made out of the names, they made a list of all qualified jurors, a list of about 2,500?
A. That is correct.

Q. That list now, I will ask you whether there was any designation on that list of whether the person was white or colored?

A. No, sir.

Q. So when the jury box was made up and the names were selected and placed in the box there was no designation of the individual juror as to whether he was white or colored?

A. To the best of my knowledge I would say no.

Q. Have you since observed the calling of the jury by the judge of the superior court?

A. That I have.

Q. Have you seen any designation of the color of the man, either white or colored, as it is withdrawn from the jury box?

A. Definitely not.

Q. Now from the 2,500 that are in the petit jury box what
11 portion are called for the grand jury or grand jury service?

A. Well, that was brought up by some member of the jury commissioners, and it was unanimously agreed that they would take twenty-five per cent of the names in the petit jury box and place them in the grand jury box.

Q. Were those names taken from the same list by the jury commissioners or were they drawn from the box into the grand jury box, or was another list prepared showing the same names?

A. I don't recall exactly about that.

Q. I will ask you whether or not you observed there that there was any systematic exclusion of people from the jury box by reason of color?

A. No, sir.

Q. From your observation there was there any discrimination made by the grand jury commissioners or by the jury commissioners, were they concerned in any particular as to number and color, the number of colored or the number of whites?

Mr. COMBS: We made an attack on the grand jury list, we have made no attack on the petit jury, and we think that is irrelevant.

Mr. HAMES: From the petit jury list the grand jury list is taken.

The COURT: I overrule the objection.

Q. Was there any exclusion, any systematic effort, or any effort at all, on the part of the jury commissioners to exclude any person from the grand jury list by reason of color?

A. No, sir.

Q. Are you positive of that?

A. Yes, sir.

12 Q. Have there been members of the colored race called as grand jurors at this or any other term of this court?

A. I can't say about that.

Q. You don't know because the name is not designated and there is no indication to you whether the person is colored or not?
A. No, sir.
Q. So you can't know whether one has been called or not, can you?
A. No, sir.

By Mr. Combs:

Q. Why are there only six colored grand jurors on the list?
A. That I don't know. You will have to ask the jury commissioners.

By Mr. Hames:

Q. (Continuing). Was there any designation on the name of a juror that is placed upon the slip; is there any designation in color or anything else that would attract the attention, as to the various colors of the tickets that are in the jury box?
A. None whatsoever.
Q. There is no way of knowing, except by personally knowing the person whether or not he is colored or white?
A. That would be the only way.
Q. If Frank Addison, Ed Austin, Sam Drew, or Willie Broadnax or H. K. Clements had been called as petit jurors would there be any indication that their name was also in the grand jury box, or that they have to be on the petit jury at all before they can put it in the grand jury box?
A. Yes, sir.

Further direct examination.

By Mr. Combs:

Q. Have you ever known of a negro to serve on the grand jury?
13 A. Not to my personal knowledge.
Q. You always see the grand jurors as such since you have been acting here?
A. Where I am then employed.
Q. And you have never seen a negro on there?
A. Well, no sir.

John T. LeCroy being duly sworn, testified as follows:

Direct examination.

By Mr. Combs:

Q. You are the clerk of the superior court here?
A. Yes, sir.

Q. How long have you been connected with this court as clerk and deputy, either one?

A. Since May 1935.

Q. About eighteen years?

A. Yes, sir, eighteen years this past May.

Q. During that time to your knowledge has any negro ever served on the grand jury in this county?

A. No, sir, not to my knowledge.

CROSS-EXAMINATION.

By Mr. HAMES:

Q. I will ask you whether or not the jury box has been revised?

A. Yes, sir, under the law the jury boxes are revised every two years.

Q. When was the last time that the jury box was revised in this county?

A. The jury commissioners began their work in August of 1952, and completed their work, as I recall it, around the first of October.

14 Q. I will ask you whether or not the revision has removed from the box or from the boxes any distinction as to the color or race of the members whose names are in the boxes?

A. No, sir, there isn't any; there is no distinction.

Q. Is that the revision that took place in 1952, that you described?

A. Yes, sir.

Q. Is there any systematic effort on the part of any one, either the court officials or the jury commissioners, to systematically exclude persons of the colored race from either the grand or the petit jury?

A. No, sir.

Q. Is there any designation, by color or otherwise, that would attract attention of either a jury reviser or any court official, that would point out to them the distinction in race?

A. No, sir, all the names are listed on the same sort of paper.

Q. Are you present when the court summons both grand and petit jurors?

A. Yes, sir, as a rule.

Q. Have you observed the slips as drawn from the grand jury and petit jury boxes?

A. Yes, sir.

Q. Is there anything there to indicate by color or anything else that would attract the court's attention at all, or the sheriff's attention to the fact that the person being summoned for grand jury or petit jury service was a white or colored person?

A. No, sir.

Q. Based upon the eighteen years time that you have served the court is there now in existence and being used there by either the jury commissioners or by any court official or any one else who has any portion or part of duty in performing any service in the selection, calling, summoning and empaneling or jurors any plan that is made for the purpose of excluding people of color from either grand or petit jury service?

A. Not to my knowledge, no sir.

RE-DIRECT EXAMINATION.

By Mr. COMBS:

Q. The jury commissioners do know their ages in their selection of them?

A. No, sir, they do not.

HEZEKIAH CLEMENTS being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. COMBS:

Q. You are a member of the colored race?
A. Yes, sir.
Q. Have you ever served on the grand jury in this county?
A. Yes, sir.
Q. Do you live in this county?
A. No, sir.
Q. Where do you live?
A. Out here in Maclins District.
Q. How long have you lived there?
A. Since 1902.
Q. Fifty-one years?
A. Yes, sir.

CROSS-EXAMINATION.

By Mr. HAMES:

16 Q. How old are you?
A. I am eighty years old.
Q. Are you a little hard of hearing?
A. Yes, sir.
Q. Would you serve as a grand juror if you were summoned, or would you claim your exemption under the law?
A. I don't know, I am mighty old to be serving on the grand jury; I never have.
Q. And you don't expect to?

A. No.

Q. And you would probably ask to be excused by the court if you were summoned as a grand juror?

A. I don't know, I expect I would.

FURTHER DIRECT EXAMINATION.

By Mr. COMBS:

Q. Do you know why they put your name in the grand jury box, and you being so old?

A. No, sir.

SAM DREW being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. Your name is Sam Drew?

A. Yes, sir.

Q. Do you live in this county?

A. Yes, sir.

Q. How long have you lived in this county?

A. About thirty-two years.

Q. How old are you?

A. I will be sixty-two.

17 Q. When were you born?

A. In 1892.

Q. Have you ever served on a grand jury in this county?

A. No, sir.

Q. Do you know other people who are qualified by—other colored people who are qualified by education, uprightness and intelligence in this county who have ever served on the grand jury?

A. No, sir.

Q. You don't know any?

A. Yes, sir, I know some that have not served.

Q. The ones that you know, are they upright men, colored men?

A. As far as know, I believe so.

Q. Are you so qualified by education to serve on the grand jury if called?

A. Yes, sir.

Q. Have you ever known any of them to serve on the grand jury?

A. No, sir.

CROSS-EXAMINATION.

By Mr. HAMES:

Q. You have been called up here in court lately, haven't you?

A. No, sir.

Q. You haven't been called for jury service?
A. Yes, sir, this year.
Q. Were you sworn and empaneled in court for that week?
A. No, sir, I got a subpoena.
Q. And did you ask to be excused?
A. Yes, sir.

18 FRANK ADDISON being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. Your name is Frank Addison?
A. Yes, sir.
Q. Are you a member of the colored race?
A. Yes, sir.
Q. Do you live in this county?
A. Yes, sir.
Q. How long have you lived in this county?
A. All my life.
Q. What is your age?
A. I am sixty-two.
Q. Have you ever served on the grand jury in this county?
A. No, sir.
Q. Do you know other people of your race who are upright and intelligent and who own property in this county——
A. No, sir.
Q. You don't know any upright people in this county?
A. Yes, sir, I know some of them.
Q. Upright, intelligent colored people?
A. Yes, sir.
Q. That are qualified to serve on the grand jury?
A. Yes, sir.
Q. Did you ever know any of them to serve on the grand jury?
A. No, sir.

CROSS-EXAMINATION.

By Mr. HAMES:

Q. You are a member of the present panel here in court, are you not?
19 A. Yes, sir.
Q. You were sworn Monday morning?
A. Yes, sir.
Q. And you are also the same Frank Addison whose name appears on the list of grand jurors of this county?

A. Yes, sir.

Q. And Hezekiah Clements and Ed Austin and Sam Drew and John J. Hill were on the list of grand jurors in this county?

A. Well, in the paper that I saw my name last week, where you all elected me, I didn't see no colored person but Ed Austin; that was the only name I saw of colored people; the paper said I was to report here on Monday morning, and in the meantime I got a card, and I looked at it and I reported here on Monday morning to the sheriff.

Q. Those people whose names I called are the same people whose names are on the grand jury list, that were read here a few minutes ago by Mr. Terry?

A. Yes, sir.

Q. And you were one of the grand jurors, on the grand jury list, were you not?

A. Yes, sir.

By Mr. COMBS:

Q. You never have served?

A. No, sir.

By Mr. HAMES:

Q. (Continuing). This is the first time you have been called since 1952 as a petit juror?

A. This is the first time I have ever been called in my life.

Q. Do you know when the last revision of the petit and grand jury list was made?

20 A. No, sir, I haven't been here for that.

Q. You don't know when it was made?

A. No, sir.

Q. You don't know when the revision was made in 1952 that there was no distinction made between the colored people and the white people as their names appeared on the grand and petit jury lists?

A. I don't know.

Q. Do you think you are being called as the result of that revision that has been made?

A. Yes, sir, I believe it is.

JOHN J. HILL being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. Your name is John J. Hill?

A. Yes, sir.

Q. Do you live in Cobb County?
A. Yes, sir.
Q. How long have you lived here?
A. Fifty odd years.
Q. How old are you?
A. Sixty-two.
Q. Have you ever served on the grand jury in this county?
A. No, sir.
Q. In prior years on the grand jury?
A. No, sir.
Q. Did you ever know a colored person in this county, other colored people in the county, who are upright—do you know other upright colored people?
21 A. Yes, sir.
Q. And who are upright people?
A. Yes, sir.
Q. Do they own property?
A. Yes, sir.
Q. Did you ever know one of them to be called on the grand jury?
A. No, sir.

CROSS EXAMINATION.

By Mr. HAMES:

Q. You know a lot of white people sixty-five years old, around here? You have known a lot of white people in the 55 years that you have been around here?
A. Yes, sir.
Q. And who are honest, intelligent and upright white people?
A. Yes, sir.
Q. And you know a lot of them that haven't served on the grand jury too, don't you?
A. Yes, sir.
Q. And you are not contending that there was any unfair means used to exclude colored people of this county from the grand jury or the petit jury, are you?
A. I don't know of it.
Q. You were called as a juror at one term of the court here this year, weren't you?
A. Yes, sir.
Q. Which term of court was that?
A. It was the superior court, July or August.
Q. It was the August term of the court that you were up here, wasn't it?
22 A. Yes, sir.

OFFER IN EVIDENCE

Mr. COMBS: Now I tender in evidence here this census of the population of 1950, under the heading of Cobb County, which shows that a total of all classes over 21 years of age is thirty-six thousand. It shows male, white 16,201, and it shows non-white, male, 1710; we tender that in evidence in support of our motion.

Mr. HAMES: I object to that on the ground that there is no certification that this is a true and correct copy of the census, no certification shown by Congress; and we object to it for the further reason that in his plea and motion to quash he sets up the charge that negroes are being systematically excluded from the grand jury box, there being no showing as to what number of the non-whites are people of color or negroes, and we think this would have no bearing on the issue that he is talking about and that he is offering by his motion to quash; the designation of non-whites does not show how much would be negroes and how much would be of other races; and we object to it on the ground that it is not properly certified.

The COURT: I will overrule the objection, and admit it.

Mr. HAMES: I move now to exclude all testimony of the witnesses offered by the movant concerning the jury service of any person prior to 1952, and as to whether or not they have served, there having been conclusively shown a revision of the jury lists and in which the nature and operation of the selection and drawing and placing of the names in the boxes have been detailed, and there being no showing on the part of the movant that that system
23 as presently in existence, as testified to by his own witnesses is a system that systematically excludes jurors. I move to dismiss the challenge to the array for that purpose and upon those grounds.

The COURT: Do you wish to say anything further, Mr. Combs?

Mr. COMBS: I have no argument to make—just the facts.

The COURT: Does anybody else want to say anything else on either side on this motion to quash.

Mr. COMBS: Nothing further than the evidence.

The COURT: I overrule the motion to exclude the evidence that has been introduced. And you can take an order overruling the motion to quash the indictment; and also on the motion for a continuance.

The court then proceeded in the matter of the selection of the jury.

Mr. HAMES: By agreement between counsel for the state and the defendant the questions on the voir dire will be asked collectively of the jurors.

And after the selection of the jury the trial proceeded with the introduction of evidence.

24 In the Supreme Court of Georgia

Case No. 18553

REECE

v.

THE STATE

Submitted April 13, 1954 and Decided May 11, 1954

SYLLABUS OPINION BY THE COURT

CHANDLER, *Justice.*

Amos Reece was indicted for rape in Cobb County, and was convicted without any recommendation and sentenced to be electrocuted. Thereafter he filed a motion for a new trial on the usual general grounds, and later amended it by adding two special grounds. He excepted in due time to the denial of his amended motion for new trial, and assigns error on pendente lite exceptions to two antecedent rulings, one refusing to continue the case, and the other denying his motion to quash the indictment. *Held:*

1. When, as here, the accused has been arrested for the commission of a penal offense and is committed to jail, he is apprised of the fact that his case or the charge against him will undergo grand jury investigation, and it is incumbent upon him to raise objections to the competency of the grand jurors before they find an indictment against him. Such being the instant case, the court did not err in denying the motion to quash the indictment. See Turner v. State, 78 Ga. 174; Lascelles v. State, 90 Ga. 347, 372 (16 S.E. 945, 35 Am. St. R. 216); Parris v. State, 125 Ga. 777 (54 S.E. 751); Tucker v. State, 135 Ga. 79 (68 S.E. 786); Burns v. State, 191 Ga. 60, 64 (11 S.E. 2d 350); Harris v. State, 191 Ga. 243 (5), 249 (12 S.E. 2d 64). And this rule applies whether the accused had counsel before the indictment was returned against him or not. Tucker v. State, supra.

2. In the instant case the judge charged the jury: "Generally, with regard to the question of sanity or insanity at the time of the alleged act and the act alleged to be a crime, the true test
25 of sanity or insanity is as follows: The insanity which renders the perpetrator of a particular act which is criminal incapable of committing a crime is such as deprives him of his capacity to distinguish between right and wrong relative to such act. Mere feeble-

ness or weakness of mind is not sufficient to excuse a person from crime, provided the mind is still sufficient to distinguish between right and wrong with relation to the act charged." Subsequently, the judge gave this further instruction: "The law does not attempt to measure the degree of insanity which renders a man legally responsible for his acts. That is a question for the jury." To this latter instruction the defendant excepts on the ground that it is an abstractly incorrect statement of the law, in that the law does fix a degree of insanity with which a person may be afflicted and yet be legally responsible for his acts, and that the instruction complained of was inconsistent with and antagonistic to the charge set out above and tended to and did confuse and mislead the jury as to a material issue involved in movant's case. It is also alleged that the charge complained of left with the jury two distinct propositions of law directly antagonistic to and in conflict with each other, and that the excerpt complained of was not withdrawn by the judge anywhere in his charge. Since the trial judge had previously given a correct charge on the issue of insanity, we agree and hold that his further instruction on the question of criminal responsibility was misleading and confusing and therefore injurious to the accused. See, in this connection, Caison v. State, 171 Ga. 1 (154 S.E. 337); Geer v. State, 184 Ga. 805 (193 S. E. 776); and Bryant v. State, 191 Ga. 686 (13 S.E. 2d 820). In those three cases the trial judge had charged that the law does not attempt to measure the degree of insanity which renders a person irresponsible for his acts, and the cases were reversed by this court for the reason that the law does fix the degree of insanity which renders one irresponsible for his acts.

26 (a) Where the judge gives a correct instruction upon an issue involved in a criminal case,—as he did in this case by the instruction first quoted—and afterwards gives a further instruction upon the same issue, which is misleading and confusing to the jury, and fails to withdraw such further charge and call the jury's attention to its withdrawal, error results. That part of the charge here complained of was calculated to leave the jury in such a confused condition of mind that they could not render an intelligent verdict. See Morris v. Warlick, 118 Ga. 421 (2) (45 S.E. 407); Gill v. Willingham, 156 Ga. 728 (4) (120 S.E. 108).

3. Since the case will be remanded for another trial, it is unnecessary for us to consider the assignment of error complaining of the court's refusal to continue the case on the defendant's motion.

4. The other special ground of the motion for new trial complains of the admission of certain testimony over the defendant's objection. However, this ground has neither been argued in the brief filed for the plaintiff in error, nor otherwise insisted upon in this court, and will therefore be treated as abandoned. Rabun v. Wynn, 209 Ga. 80 (1) (70 S.E. 2d 745).

5. The evidence was amply sufficient to authorize the verdict, and the general grounds of the motion for new trial are accordingly without merit. However, for the reason stated in headnote 2 above, the trial judge erred in denying the motion for new trial as amended.

Judgment reversed. All the Justices concur, except DUCKWORTH, C. J., who dissents.

27 IN THE SUPERIOR COURT OF COBB COUNTY

THE STATE

vs.

AMOS REESE

Indictment No. 1961

SPECIAL PLEA IN ABATEMENT—Filed June 22, 1954

GEORGIA,
Cobb County.

To the Superior Court of said County:

Comes Now, AMOS REESE, the defendant in the above stated indictment, and through his attorney, and before pleading to the merits on said indictment, and without waiving his right to so plead, brings this his challenge to the entire array of jurors put upon him brings this his motion to quash the said indictment, brings this his motion to quash and nullify all the panels of the jurors put upon him; to quash nullify and render void the entire list of Grand Jurors, particularly the Grand Jury which returned said indictment, and to nullify and render void the appointment of the Jury Commission which selected the names of the persons whose names appear in the Grand Jury box and the Petit Jury box of said County, and for cause hereof shows:

1.

Movant, Amos Reese, is a male person, and is a member of the Negro race.

2.

The movant was indicted by the Grand Jury of Cobb County as the same was composed on October 23, 1953, for the offense of rape upon a white female person, the alleged offense having transpired on October 20, 1953.

3.

The indictment has been called for trial in said court for June 22, 1954, and an array of Petit Jurors has been drawn from the jury box, summoned to be in court, and the panels of jurors 28 are now completed and ready to be put upon the movant.

4.

The movant is a person of low mentality, is illiterate and at the time he was indicted by the said Grand Jury he was incarcerated in the common jail of Cobb County and had been for two days prior to said indictment, and had not conferred with an attorney and did not have the benefit of counsel. The movant at that time did not know the names of any individual who was on the Grand Jury at the October term of the Superior Court of Cobb County, in 1953. The movant did not know, and had not been informed, that the Jury Commission of said County which selected all persons whose names were placed in the Grand Jury box of said County was composed exclusively of male white persons. The movant did not know at the time of his aforesaid indictment that never in all the history of Cobb County had a member of his race been appointed by the Judge of the Superior Court of said county to be a member of said Jury Commission. Movant did not know, and had not been informed, that under the Constitution of the United States, the 14th Amendment thereof, that he was entitled to have the said offense for which he was indicted considered by a Grand Jury composed of persons from which members of the Negro race had not been systematically excluded by reason of their race and color, and that he was entitled under said Amendment of the Federal Constitution to have the offense for which he was indicted considered by a Grand Jury composed of members who had been drawn from the Grand Jury box which had been made and filled by a Jury Commission for which members of the Negro race had not been excluded solely because of their race and color.

29 5.

Movant shows that the Grand Jury list and the Petit Jury list are compiled by a Board of Commissioners, which said Board is composed of six discreet persons who are not practicing attorneys at law nor County officers and that they are appointed for a term of six years by the Judge of the Superior Court. He shows that the said Jury Commissioners select from the books of the Tax Receiver the persons to serve as both Grand Jurors and Petit Jurors.

6.

Movant shows that no person who is drawn as a Grand Juror shall be called during the same term as a Traverse or Petit Juror.

7.

Movant shows that there are in Cobb County, Georgia, according to the 1950 U. S. Census 16,201 White male citizens twenty-one years old and older, and that there are 1,710 Negro male citizens twenty-one years old and older. Movant shows that there were selected by the aforesaid Jury Commission of Cobb County the names of 2,500 persons and that the said 2,500 names appear in the Traverse Jury box of said county. Movant shows that 25% of the aforesaid 2,500 names which appear in the Traverse Jury box of said county appear in the Grand Jury box of said county. Movant shows that the aforesaid Jury Commission selected six persons who are members of the Negro race and placed the names of the aforesaid six persons in the Traverse Jury box of said county and in the Grand Jury box of said county. Movant shows that the six persons whose names appear in the Grand Jury box of said county are the names of the identical persons whose names appear in the Traverse Jury box of said county. Movant shows that three of the names of the Negro persons whose names appear in both the Grand Jury box and the Petit Jury Box of said county are eighty years of age and older. Movant shows that there are a large number of Negro citizens in Cobb County, Georgia, who are upright intelligent and discreet persons, and whose names appear on the books of the Tax Receiver of said county.

8.

Movant shows that there has never been a member of the Negro race selected to serve on the Board of Jury Commissioners of Cobb County, Georgia. He shows that there are at least 100 citizens of said county who are members of the Negro race who are discreet, competent and qualified as to age, experience, intelligence and uprightness to act as Jury Commissioner of said County, but that notwithstanding this fact members of the Negro race have been systematically and purposely excluded from service on the Board of Jury Commissioners solely on account of their being members of the Negro race.

9.

Movant shows that the systematic and purposeful exclusion of Negroes from the Board of Jury Commission of said county is a violation of the rights of the movant under Article 1, Section 1, paragraph 3 of the Constitution of Georgia, and is a violation of his rights under Article 1, Section 1, paragraph 25 of the Constitution of Georgia, and is contrary to the 14th Amendment of the Constitution of the United States.

10.

Movant shows that the entire list of Petit Jurors and Grand Jurors as selected by said illegal and void Jury Commission of said County is tainted with illegality because the said list of Grand Jurors and Petit Jurors and the names of all persons whose names appear in the Grand Jury box and in the Traverse Jury box were selected and made up by a Jury Commission which existed
31 in contravention of the 14th Amendment of the Constitution of the United States; and that said Grand Jury box and Traverse Jury box, as the same is now constituted in the aforesaid County, is illegal and void as to the movant by reason of the fact that the names of the persons who are in said boxes were selected by a Commission from which members of the Negro race had been purposely, systematically and arbitrarily excluded on account of their race and color.

11.

Movant shows that the said list of Grand Jurors and list of Petit Jurors, as the same are presently constituted, are illegal and void, and that the same should be quashed, set aside and cancelled, and that the aforesaid indictment returned by the aforesaid Grand Jury, which is tainted with the aforesaid illegality, should be quashed, set aside and voided by this court.

12.

Movant shows that for the past thirty years no member of the Negro race has been drawn to serve, nor has served, as a member of a Grand Jury in said County.

13.

Movant shows that there are numerous citizens who are members of the Negro race who are competent and qualified for Grand Jury service as to age, experience, intelligence and uprightness, and who are legally qualified to act as Grand Jurors, but that the names of these persons have been purposely, systematically and expressly excluded from the list of names of persons who are drawn for Grand Jury duty. Movant shows that the aforesaid Jury Commission in selecting the names of persons to be placed in the Grand Jury box in said County have purposely, systematically and expressly limited the said number to only six members of the Negro race, and that three of the said six whose names appear in the Grand Jury box are beyond the age of 80 years, and are ineligible to serve.

32

14

Movant shows that there be no legal Grand Jury drawn, selected and impaneled or organized in said County to consider an indictment against a member of the Negro race for the reason that the names of Negro persons have been arbitrarily, systematically and purposely excluded from the Grand Jury list of said County because of their race and color.

15

Movant shows that there can be no legal Grand Jury drawn, selected, impaneled or organized in said County to consider an indictment against a member of the Negro race for the reason that the Jury Commission of said County is made up of six White male persons, and that the members of the Negro race have been arbitrarily, systematically and purposely excluded from said Jury Commission on account of their race and color.

16

Movant shows that an array of Petit Jurors has been put upon him for trial of the aforesaid case, and that the jury, venire and panels are composed solely of male citizens who are members of the White race and from which members of the Negro race have been expressly and systematically excluded because of their race and color.

17

Movant shows that the Petit Jury list of said County is made up of persons who reside in said County and whose names appear in the Traverse Jury box thereof, and that the names of the persons whose names are in the Traverse Jury box thereof are selected from the books of the Tax Receiver of said County and are placed in said Traverse Jury box by the Jury Commission of said County. Movant shows that for many years the names of members of the Negro
33 race have been excluded from jury duty in said County as a result of a scheme and devise purposely and systematically practiced by the officials of said County who limit the number of names of qualified negroes whose names appear on the Traverse Jury list to six; and that three of said number are not qualified to serve by reason of Section 59-112 of the Code of Georgia of 1933.

18

Movant shows that there are numerous citizens of said County who are members of the Negro race who are competent and qualified as to age, experience, intelligence and uprightness, and who are legally qualified to act as Petit Jurors, but that the names of these

persons have been purposely, systematically and expressly excluded from jury service solely on account of their being members of the Negro race.

19

Movant shows that the systematic and purposeful exclusion of Negroes from the Board of Jury Commissioners of Cobb County, from Grand Jury service in said County, and from Petit Jury service in said County, is a violation of the rights of movant under Article 1, Section 1, paragraph 3 of the Constitution of Georgia, which is the "due process clause", and a violation of his rights under the 14th Amendment to the Constitution of the United States of America and of 8 U.S.C.A. paragraph 44.

Wherefore, the movant prays:

(a) That this court quash the appointment of the Jury Commission of said County;

(b) That this court set aside, cancel and annul the entire jury list of said County as made up and compiled by the aforesaid Jury Commission;

34 (c) That this court rule and decree that the Grand Jury which returned the aforesaid indictment was illegally selected;

(d) That the court quash the said panel of Grand Jurors for the said term of the said court which returned the aforesaid indictment, and that it quash, cancel and set aside the aforesaid indictment;

(e) That this court quash, annul and set aside the entire Petit Jury, Venire and Panel now put upon the movant;

(f) That this court, in order to insure a trial of the movant in accordance with the constitution and laws of Georgia and the Constitution and laws of the United States of America, grant any further and additional relief in the premises as to the court may seem meet and proper.

Duly sworn to by Amos Reece. Jurat omitted in printing.

DANIEL DUKE,
Attorney for Defendant.

[File endorsement omitted]

35 In the Superior Court of Cobb County

[Title omitted]

DEMURRER TO DEFENDANT'S SPECIAL PLEA IN ABATEMENT—
Filed June 22, 1954

Comes now Luther C. Hames, Jr., Solicitor General, Cobb Judicial Circuit, and files this his demurrer to the plea in abatement and mo-

tion this day filed by the defendant, and for grounds and reasons says:

1

The State demurs to said motion to quash upon the ground and for the reason that none of the parts or paragraphs, and neither in its entirety does the said motion set forth sufficient cause or grounds to abate said indictment.

2

The State demurs to said motion to quash for the reason that a true bill has been found by the grand jury regularly and legally organized and the defendant had notice of the questions now attempted to be raised prior to the finding of the true bill, as shown upon the face of said motion, and for this reason said motion is too late and improperly raised at this time and said motion should be stricken.

3

The State demurs to said motion to quash upon the ground and for the reason that the challenge to the grand jurors as contained in said motion are the same grounds and upon the same reasons embraced in a challenge to the array filed at the October, 1953 term, Cobb Superior Court, upon which said challenge filed at the October, 1953 term the Court then and there denied the same, and that the said ruling was embraced in a motion for a new trial in the case of Amos Reece vs. The State, No. 18,553 in the Supreme Court of Georgia, and in the said Supreme Court the judgment of
36 the trial court (Cobb Superior Court) in that particular was affirmed, and for such reason the same constitutes the law of the case and res adjudicata.

4

The State demurs to said motion upon the ground and for the reason that the issues now sought to be raised by the motion to quash should have been incorporated in and made a part of the motion to quash filed by the defendant at the October, 1953 term, upon which motion the trial court entered an order denying the challenge to the grand jurors, this judgment thereafter being affirmed by the Supreme Court of Georgia in case No. 18,553, May 11, 1954, and all issues as to the appointment of jury commissioners, their qualification and performance of duties, the selection and empanelling of both grand and petit jurors should have been raised in said motion, and the same not having been raised, are waived, and therefore the action at the October, 1953 term of court and the affirmance by the Supreme Court of such action constitutes the law of the case and res adjudicata.

5

The State further demurs to said motion to quash upon the ground and for the reason that it is a challenge propter affectum, which must be taken advantage of upon the call of the case, and the defendant having previously filed at the October, 1953 term, Cobb Superior Court a motion to quash upon a basis of propter affectum and the trial court to said previous motion to quash having passed an order overruling the same, the action of the trial court having been affirmed in the case of Amos Reece vs. The State, No. 18,553, May 11, 1954, the same constitutes the law of the case and res adjudicata.

37

6.

The State further demurs to said motion to quash upon the ground and for the reason that it is a challenge propter defectum, which must be taken advantage of upon the call of the case, and the defendant having previously filed at the October, 1953 term, Cobb Superior Court, a motion to quash upon a basis of propter defectum, and the trial court to said previous motion to quash having passed an order overruling the same, the action of the trial court having been affirmed in the case of Amos Reece vs. The State, No. 18,553, May 11, 1954, the same constitutes the law of the case and res adjudicata.

7.

The State further demurs to the motion to quash as a whole upon the ground that the basis for the same as laid are erroneous conclusions as to constitutional rights guaranteed to defendant, in that defendant claims guarantees under the due process and equal protection clause of the Constitution of both the State of Georgia and the United States, which are erroneous conclusions, and said motion for this reason should be dismissed.

8.

The State demurs specially to the allegations contained in paragraphs 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the motion to quash, upon the ground and for the reason that the facts set forth in said paragraph are the same facts and the same issues as contained in a motion to quash filed by said defendant in the same case at the October, 1953 term, Cobb Superior Court, the trial court having at said term of court overruled the motion to quash and thereafter the Supreme Court of Georgia, on the 11th day of May, 1954, having affirmed the judgment and decree of the trial court overruling said motion to quash, and for such

38 ground and reason the allegations contained in said paragraphs constitute the law of the case and res adjudicata.

Wherefore the State prays that these its grounds of demurrer be inquired into, that they be sustained, and said motion to quash dismiss.

LUTHER C. HAMES, JR.,
Solicitor General,
Cobb Judicial Circuit.

In the Superior Court of Cobb County.

JUDGMENT—June 22, 1954

The within demurrer to defendant Amos Reese's motion to quash this day filed, coming on for hearing, after hearing all pleadings read and argument of both counsel same is hereby sustained and motion to quash, denied. This June 22, 1954.

JAS. T. MANNING,
Judge, S. C. Cobb Jud. Circuit.

[File endorsement omitted.]

39 In the Supreme Court of Georgia

Case No. 18780

AMOS REECE

v.

THE STATE

Decided January 10, 1955

Rehearing denied February 17, 1955

SYLLABUS OPINION BY THE COURT

DUCKWORTH, *Chief Justice.*

(1) 1. In the first appearance of this case, Reece v. State, 210 Ga. 378, 82 S.E. 2d 10, this court ruled that the accused failed to raise objections to the competency of the grand jurors before the indictment was found against him and, therefore, the lower court did not err in denying his motion to quash the indictment for this reason; hence the attempt to again challenge the array of grand jurors and to quash the indictment upon the same ground must fail, as this question has already been adjudicated adversely to the defendant, and the court did not err in sustaining the demurrer thereto.

(2) 2. The other allegations of the plea or motion to quash the indictment which, in substance, alleges that there are only 6 persons of the Negro race whose names appear in both grand-jury and traverse-jury boxes of Cobb County, that three of these are 80 years of age or older, that none of the members of the Board of Jury Commissioners has ever been a member of the Negro race or that no member of the Negro race has ever been drawn to serve on the grand jury in the past 30 years, fails to show a "systematic and purposeful exclusion of Negroes" from the Board of Jury Commissioners, or from jury service in said county, and these allegations fail to show any violation of the rights of the movant under either the State or Federal Constitutions. Hence the court did not err in sustaining the demurrer to the plea or motion and denying the same. See Code Ann. 2-5102, Const. art. 6, 16, par. 2; Code Ch. 59-1 and particularly Code, 59-803 thereof; Wheeler v. State, 42 Ga. 306, 307, 308; Thomas v. State, 67 Ga. 460(1); Wilson v. State, 69 Ga. 224; McLain v. State, 71 Ga. 279; Davis v. Arthur, 139 Ga. 74, 76 S.E. 676; Carter v. State, 143 Ga. 632(2), 85 S.E. 884; Harris v. State, 191 Ga. 243(8), 12 S.E. 2d 64; Rawlins v. State, 124 Ga. 31, 52 S.E. 1; Rawlins v. State of Georgia, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899, affirming Rawlins v. State, 124 Ga. 31, 52 S.E. supra; Watkins v. State, 199 Ga. 81(6), 33 S.E. 2d 325; Crumb v. State, 205 Ga. 547, 54 S.E. 2d 639.

(3) 3. Whether or not the reading of an excerpt from a former decision of this court in Dorsey v. State, 108 Ga. 477 (2), 34 S.E. 135, to the court in the opening argument as to the difference in race and social standing of the accused and the prosecutrix as facts to be considered in determining if a crime was committed, was error and harmful to the accused, the court promptly instructed the jury to disregard the decision and to "disabuse your minds of the question of race, or position and social standing" of the citizens involved. This instruction was sufficient to remove any improper impression from the minds of the members of the jury. See Code, 81-1009; Joyner v. State, 208 Ga. 435, 67 S.E. 2d 221; Nelson v. State, 187 Ga. 576 (6), 1 S.E. 2d 641; Holley v. State, 191 Ga. 804, 807 (8), 14 S.E. 2d 103; Smith v. State, 201 Ga. 184, 188 (2), 48 S.E. 2d 860; Bond v. State, 68 Ga. App. 15 (2), 21 S.E. 2d 866.

(4) 4. The evidence was sufficient to support the verdict and the general grounds of the motion are without merit. The court did not err in denying the motion for new trial, as amended.

Judgment affirmed.

All the Justices concur.

42 Supreme Court of the United States, October Term, 1954

No. 588 Misc.

AMOS REECE, PETITIONER,

vs.

STATE OF GEORGIA

On petition for writ of Certiorari to the Supreme Court of the State of Georgia.

ORDER ALLOWING CERTIORARI—May 31, 1955

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted and the case is transferred to the appellate docket as No. 832 and assigned for argument immediately following No. 628.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1955 954753 184